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Kentucky Law Survey: Criminal Procedure

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CRIMINAL PROCEDURE

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I. SEARCH AND SEIZURE

Among the most common criminal procedure questions dealt with by federal and Kentucky appellate courts are those that pertain to search and seizure. In this Survey year, the predominant search and seizure issue concerned the scope of "standing" to assert violations of the fourth amendment and thereby invoke the protection of the exclusionary rule.[1] The importance of the constitutional principles underlying the exclusionary rule was another area of emphasis this year, as the Kentucky Supreme Court overturned the convictions of guilty defendants rather than interpreting facts so as to avoid that drastic result.

A. *Standing to Assert Fourth Amendment Violations*

It is not enough that evidence has been illegally obtained for it to be inadmissible. The exclusionary rule protects only the personal rights of one who is the target of an unreasonable search and seizure.[2] Entitlement to raise fourth amendment objections traditionally was thought of in terms of "standing." In *Jones v. United States*,[3] the Supreme Court held that a defendant has "automatic standing" if the crime charged was possession of the items seized or the defendant was legitimately on the premises searched.[4]

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[1] The exclusionary rule was held applicable to the states by reason of the due process clause of the fourteenth amendment in Mapp v. Ohio, 367 U.S. 643 (1961).

[2] *E.g.*, Alderman v. United States, 394 U.S. 165 (1969); Jones v. United States, 362 U.S. 257 (1960).

[3] 362 U.S. 257 (1960).

[4] Prior to *Jones*, the federal Courts of Appeals established rules for standing to assert fourth amendment protection which "generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Id.* at 261. In its *Jones* decision, the Court reasoned that the prosecution of possession offenses presented a special problem. Without automatic standing, a defendant would be forced to establish standing

By 1978 the Court had abandoned the notion of "standing" in favor of an inquiry into whether the defendant had "a legitimate expectation of privacy in the invaded place."[5] During the period since *Jones*, the rationale for the "automatic standing" rule also has become outmoded.[6] However, before the United States Supreme Court had occasion to specifically reconsider the validity of *Jones* in the context of a possessory offense, the Kentucky Supreme Court decided *Rawlings v. Commonwealth*.[7] In that case, the defendant Rawlings was charged and convicted of the offense of possession of controlled substances for the purpose of sale. Rawlings and four other persons were present in the residence of Lawrence Marquess. Police officers entered the residence to arrest Marquess pursuant to a warrant. After detecting the odor of marijuana smoke in the house, they detained the other occupants, forbidding them to leave unless they consented to a body search, while other officers obtained a search warrant. When the officers who had procured a warrant for the search of the house returned forty-five minutes later, one occupant, Vanessa Cox, was ordered to empty her purse. Upon doing so, a large quantity of LSD and other drugs was discovered. Rawlings told the officers that he was the owner of the drugs, whereupon he was

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by testifying to facts which would be sufficient to convict him. Thus, the defendant faced the dilemma of relinquishing one constitutional right, the right against self-incrimination, against another, the fourth amendment right. Additionally, without automatic standing, the prosecution would be allowed to assert the contradictory positions that the defendant had no possession for standing purposes, but had possession for conviction purposes, a situation the Court found to be "not consonant with the amenities . . . of the administration of criminal justice." *Id.* at 263.

[5] Rakas v. United States, 439 U.S. 128 (1978). *See* United States v. Salvucci, 448 U.S. 83, 92 (1980).

[6] In the 20 years which have lapsed since the Court's decision in *Jones*, the two reasons which led the Court to the rule of automatic standing have likewise been affected by time. This Court has held that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial. *Simmons v. United States,* 390 U.S. 377 . . . (1968). Developments in the principles of Fourth Amendment standing, as well, clarify that a prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure.

United States v. Salvucci, 448 U.S. at 88-89.

[7] 581 S.W.2d 348 (Ky. 1979), *aff'd sub nom.* Rawlings v. Kentucky, 448 U.S. 98 (1980).

searched. A knife and $4,500 were found on his person. Rawlings moved to suppress the evidence, contending that Cox's purse was not within the area of search described in the warrant, which was Marquess' house.

The trial court overruled Rawlings' motion to suppress the drugs, money and statement made to the police on the ground that Rawlings lacked standing to contest the search. The Kentucky Court of Appeals affirmed on different grounds, holding that Rawlings had standing but that no fourth amendment violation occurred because the police had probable cause to arrest the occupants after smelling marijuana smoke. The Kentucky Supreme Court considered the case on discretionary review and affirmed, again on different grounds. The Court held that *Rakas v. United States*[8] "seems to reject the [automatic standing] theory of *Jones*,"[9] and thus the sole inquiry was whether Rawlings had a legitimate or reasonable expectation of privacy in the purse in which the drugs were found. "Considering the totality of the circumstances," the Court held, "the search did not violate Rawlings' legitimate or reasonable expectation of freedom from governmental intrusion into the purse,"[10] and thus his substantive fourth amendment rights were not violated,[11] even assuming the evidence was seized illegally.

The United States Supreme Court granted certiorari in

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[8] 439 U.S. 128 (1978).

[9] 581 S.W.2d at 349-50.

[10] *Id.* at 350.

[11] Another Kentucky case decided before the United States Supreme Court was faced with a *Jones*-type case (after the apparent erosion of the reasons underlying the automatic standing rule) was Commonwealth v. Bertram, 596 S.W.2d 379 (Ky. Ct. App. 1980), which held that "the 'automatic standing' aspect of *Jones* . . . does not appear to have any application to cases arising in this jurisdiction." *Id.* at 380-81.

It is interesting to note that, at the time of *Bertram*, there may have existed some question whether the *Simmons* rule (against use of pretrial suppression hearing testimony on the issue of guilt) was weakened by Harris v. New York, 401 U.S. 222 (1971) (evidence obtained in violation of *Miranda* rights admissible to impeach). However, the Kentucky Court of Appeals cited a Kentucky case, Shull v. Commonwealth, 475 S.W.2d 469 (1972) for the proposition that a defendant's pretrial "testimony may not thereafter be admitted against him at the trial on the issue of guilt unless he fails to object." *Id.* at 472. Thus, the *Jones* rule was discarded completely in Kentucky while a reason for its vitality in the federal system was still at least arguable.

Rawlings and issued its opinion in that case[12] during the Survey year along with its decision in another case involving fourth amendment issues, *United States v. Salvucci.*[13] In *Salvucci* the Court stated: "Today we hold that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have been violated. The automatic standing rule of *Jones v. United States* . . . is therefore overruled."[14]

The Court addressed the lack of need for the *Jones* rule thusly: "The 'dilemma' identified in *Jones*, that a defendant charged with a possessory offense might only be able to establish his standing to challenge a search and seizure by giving self-incriminating testimony admissible as evidence of his guilt, was eliminated by our decision in *Simmons* . . . ."[15]

In *Rawlings*, the United States Supreme Court articulated the factors which led to its affirmance that the defendant possessed no legitimate expectation of privacy in Vanessa Cox's purse. Foremost would appear to be "a frank admission by petitioner that he had no subjective expectation that Cox's purse would remain free from governmental intrustion."[16] Other factors included the fact that Rawlings "had never sought or received access to her purse prior to that sud-

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[12] Rawlings v. Kentucky, 448 U.S. 98 (1980).

[13] 448 U.S. 83 (1980).

[14] *Id.* at 85.

[15] *Id.* at 89. *See also* note 6 *supra* (no danger of prosecutorial self-contradiction remains).

Justice Marshall's dissent noted, however, that *Simmons* did not address whether pre-trial suppression hearing testimony would be admissible for impeachment purposes. "*Simmons*, therefore, does not eliminate the possibility that a defendant will be deterred from presenting a Fourth Amendment claim because of 'the risk [, if he chooses to testify,] that the words which he utters may later be used to incriminate him." *Id.* at 97 (Marshall, J., dissenting).

The question arises, assuming Justice Marshall's belief is correct that such testimony could be used in federal courts to impeach, whether such a use would be proper in Kentucky. Under the *Jett* doctrine (*see* Jett v. Commonwealth, 436 S.W.2d 788, 792 (Ky. 1969)), a defendant's prior statement which is inconsistent with trial testimony is admissible for substantive purposes as well as for impeachment. Thus, under *Bertram*, 596 S.W.2d 379 (Ky. Ct. App. 1980), it would appear that a defendant could testify contrary to his pretrial position without fear that his statements could be introduced, unless, the *Jett* doctrine notwithstanding, the court were to allow the prior statements to be introduced for the limited purpose of impeaching credibility.

[16] Rawlings v. Kentucky, 448 U.S. at 105.

den bailment;"[17] he had no "right to exclude other persons from access to Cox's purse;"[18] and "the precipitous nature of the transaction."[19]

Rawlings' ownership of the drugs did not create a reasonable expectation of privacy, but the Court stated that ownership was a fact to be considered in making such a determination.[20] The Court noted that *Rakas* had "rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment."[21] From this it follows that to assert a fourth amendment claim, a defendant must have an expectation of privacy in the *place* searched, not the *object* seized. Why ownership of the seized object is a "fact" to be considered is unclear. It does not appear from the language in *Rawlings* that the inquiry should ever embody any determination of privacy interest other than in the place searched.

B. *Search and Arrest Without a Warrant*

The limited constitutional power of the police to search or arrest a suspect without a warrant was reiterated by the Kentucky Supreme Court in *Martin v. Commonwealth*,[22] and by the Kentucky Court of Appeals in *Waugh v. Commonwealth*.[23] A threshold issue in *Martin* was whether the arrest of the defendant, which elicited the confession sought to be suppressed, was based on probable cause.[24] Partially on the basis of the confession, the jury convicted Martin of the strangulation murder of a 93 year-old woman.

Shortly after the woman's body was found, investigators received a call from an anonymous informant, who told them

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 105.

[21] *Id.* at 105.

[22] 592 S.W.2d 134 (Ky. 1979).

[23] 605 S.W.2d 43 (Ky. Ct. App. 1980).

[24] Martin v. Commonwealth, 592 S.W.2d at 137. The central issue in the case concerned the voluntariness of the confession. However, if the arrest had been illegal, the confession could properly be suppressed if it was the product of the illegal arrest despite the fact that it was given voluntarily. *Id.*

to "check out Martin, because 'he was in town and he was AWOL,' " in need of cash and knew the old woman.[25] Without ascertaining the reliability of the informant or the truth of the allegations, police officers began to search for Martin and eventually found him under a bed in a friend's apartment. The police informed Martin that he was being apprehended for being "AWOL," and, after reading him his *Miranda* rights, took him to the police station. Military authorities were not notified, although Martin was jailed for twenty-four hours before being questioned. After confessing to the murder "Martin was then 'arrested' for the murder and taken before a magistrate."[26]

On appeal, the Kentucky Supreme Court held that the police were not authorized to "arrest" or "apprehend" Martin for being absent without leave, a military offense.[27] The question, then, was whether there was probable cause to arrest Martin for desertion, an offense for which civil officers are empowered by Congress to arrest.[28] Probable cause did not exist, the Court held, as the arrest was based on a tip from an anonymous informer. Probable cause, under Kentucky law, must be based "upon information gained through a *reliable* informant, coupled with some type of verification of the information."[29] Neither factor was present in this case; the arrest was therefore illegal. The Court held that the confession elicited by the arrest should have been suppressed as a fruit of the illegality.

Perhaps as important as the Court's holding are the statements by Justice Lukowsky as to the reprehensible conduct by the police officers in this case. Justice Lukowsky stated that the actions of the police "had that 'quality of purposefulness' which is the target of the exclusionary rule."[30] The importance of this case lies in the fact that as great an injustice as the workings of the exclusionary rule has in a case

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[25] *Id.* at 136.

[26] *Id.* at 137.

[27] *Id.* at 138.

[28] *Id.*

[29] *Id.* (emphasis in original).

[30] *Id.* at 139.

such as this where the conviction of a cold-blooded murderer is reversed, the Kentucky Supreme Court has expressed the attitude that it will not stretch the facts to comply with the technical requirements of the fourth and fourteenth amendments to circumvent the exclusionary rule, "no matter how unpalatable that action may seem."[31]

A similar result was reached by the Kentucky Court of Appeals in a case involving a warrantless search, *Waugh v. Commonwealth*.[32] In *Waugh*, an anonymous telephone caller informed a detective that the defendant was to be at a shopping mall at 9:00 p.m. to sell drugs. The detective knew the defendant "because of previous arrests on drug-related charges."[33] The detective observed the defendant at the mall around 9:30 p.m., saw him place a phone call, then saw him turn and walk away from the detective when Waugh noticed him. Officers stopped and searched the defendant, found 20 tablets of morphine, and then placed him under arrest.[34]

The Kentucky Court of Appeals held that the Fayette Circuit Court should have suppressed the evidence because the search was not based on probable cause.[35] The Court stated the rule that probable cause can be based on information received through a *reliable* informant.[36] Where the informant is unknown, however, the tip must be "reasonably corroborated by other matters within the officer's knowledge" which are obtained pursuant to an investigation.[37] The mere presence of the suspect in the mall when it was open to the public was not sufficient corroboration, nor was the fact that he made a phone call.[38] The act of Waugh in merely turning away from the officer "was not sufficient to constitute flight or furtive action."[39] In *Waugh*, therefore, the Kentucky Court of Appeals has expressed the same attitude that the Kentucky

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[31] *Id.* at 140.
[32] 605 S.W.2d 43 (Ky. Ct. App. 1980).
[33] *Id.* at 44.
[34] *Id.*
[35] *Id.* at 46.
[36] *Id.* at 45.
[37] *Id.*
[38] *Id.*
[39] *Id.*

Supreme Court expressed in *Martin*. Neither court will, with the benefit of hindsight, interpret the facts to find probable cause to justify a search or seizure where an anonymous informant's tip is insufficiently corroborated and where, aside from the caller's information, only speculation of illegal activity exists.

II. CONFESSIONS

The most litigated issues concerning the admissibility of incriminating statements made by defendants in custody are whether the statements were voluntarily made and whether the defendants waived their rights under *Miranda v. Arizona*.[40] Recent Kentucky decisions have dealt with both of these issues.

A. *Voluntariness of Confessions*

To be admissible against a defendant, a confession must be voluntary.[41] This requirement is based upon the due process clause of the federal constitution,[42] and it represents three distinct concerns. First, coerced confessions may be unreliable indications of guilt.[43] Second, coercion intrudes upon the free choice of the defendant to assert his fifth amendment right to remain silent.[44] Third, the use of a coerced confession to convict a defendant rewards police misconduct.[45] The recent Kentucky cases indicate that only the first rationale concerns the Kentucky courts in determining the admissibility of confessions.

In *Tackett v. Commonwealth*,[46] the Kentucky Supreme Court reiterated the previously established rule that mental confusion and intoxication at the time of the confession do not, *per se*, render it involuntary.[47] In *Tackett* the Court up-

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[40] 384 U.S. 436 (1966).
[41] *E.g.*, Chapman v. California, 386 U.S. 18 (1967).
[42] *Id.*
[43] MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 148 (2d ed. 1972).
[44] *Id.*
[45] *Id.*
[46] No. 78-SC-397-MR (Ky. Sept. 11, 1979) (unpublished memorandum opinion).
[47] *Id.*, slip op. at 9.

held the trial court's findings of voluntariness because the testimony of the investigating officer showed that the defendant was coherent and alert at the time of her confession and understood the meaning and effect of her statement. In *Silverburg v. Commonwealth*,[48] after the accused in custody was told he failed a polygraph, he made an incriminating statement. Again, the Kentucky Supreme court held the statement admissible as voluntary.[49] And in *Johnson v. Commonwealth*,[50] the Supreme Court held a statement made after the police promised the defendant that he would not be subject to the death penalty to be voluntary.

In each of these cases the Supreme Court appears to be exclusively concerned with the reliability of the confessions and not with the other rationales behind the exclusionary rule as applied to confessions; that is, whether a knowing and informed waiver of the defendant's *Miranda* rights was made and whether the police acted coercively. This is in contrast to decisions by other courts and to previous decisions by the Kentucky high court. For instance, some courts have held that in certain circumstances a defendant's intoxication renders ineffective his apparent waiver of rights.[51] The United States Supreme Court[52] and previously the Kentucky high court[53] have taken a particularly dim view of coercion by implied threats or express or implied promises of leniency. *Silverburg, Johnson,* and *Tackett* evidence a trend away from due process concerns in determining the voluntariness of a confession.

B. *Waiver of* Miranda *Rights*

One recent Kentucky decision has dealt with the waiver of *Miranda* rights by an accused in custody. In *Douglas v.*

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[48] 587 S.W.2d 241 (Ky. 1979).

[49] *Id.*

[50] No. 79-SC-511-MR (Ky. April 22, 1980) (unpublished memorandum opinion).

[51] *E.g.*, Logner v. North Carolina, 260 F. Supp. 970 (M.D.N.C. 1966), *cert. denied*, 393 U.S. 857 (1968); Commonwealth v. Walker, 368 A.2d 1284 (Pa. 1977).

[52] Brady v. United States, 397 U.S. 742, 752 (1970).

[53] Devine v. Commonwealth, 258 S.W.2d 717 (Ky. 1953) (relying on KY. REV. STAT. § 422.110 [hereinafter cited as KRS]); Commonwealth v. Mayhew, 178 S.W.2d 928 (Ky. 1944).

Commonwealth,[54] the defendants, after being given their *Miranda* rights, stated they did not wish to make statements. Approximately ten minutes later, an officer who was present at the time the right to silence was invoked asked the defendants where the victims' wallets were located. As the officer turned away, one of the defendants stated where the wallets could be found.[55] The Kentucky Court of Appeals, citing the United States Supreme Court decision in *Michigan v. Mosley*,[56] held that the statement was properly admissible, because, according to the court, *Miranda* does not indefinitely prohibit further questioning.[57] However, reliance on *Mosley* probably was misplaced. The Supreme Court in *Mosley* emphasized two factors that were decisive in validating the interrogation in that case: the *significant* period of time between the initial invoking of the right and the second interrogation, and the repetition of the *Miranda* warnings prior to the second interrogation.[58] Neither factor was present in *Douglas*. The Supreme Court in *Mosley* noted that the mandate in *Miranda* that "the interrogation must cease"[59] when the person in custody indicates that he wishes to remain silent does not mean either that the questioning must cease forever or that interrogation may resume after a momentary respite.[60] *Douglas* appears to validate re-interrogation after what can only be characterized as a momentary respite.[61]

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[54] 586 S.W.2d 16 (Ky. 1979).

[55] *Id.* at 18.

[56] 423 U.S. 102 (1975).

[57] 586 S.W.2d at 18.

[58] 423 U.S. at 106-07 (1975).

[59] 364 U.S. at 473-74.

[60] 432 U.S. at 102.

[61] What is to be considered "interrogation" was recently addressed by the United States Supreme Court in Rhode Island v. Innis, 446 U.S. 291 (1980). The Court held that the term interrogation means express questioning or its functional equivalent; that is, "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Id.* at 301.

In a later case, the United States Supeme Court determined that the "interrogation" need not be conducted by the police, but the use of a paid informant in an accused's cellblock was sufficient to violate the accused's sixth amendment rights. United States v. Henry, 447 U.S. 264 (1980).

III. FRUSTRATION OF CONSTITUTIONAL RIGHTS

A fundamental concept in American criminal justice is that an accused shall not be "punished for exercising [a constitutional right]."[62] However, because of the contemporaneous objection rule[63] and the harmless error rule,[64] over-zealous prosecutors[65] frequently are successful in frustrating the effective exercise of defendants' right to silence following arrest.[66]

A. *Contemporaneous Objection Rule*

1. *Appellate Review*

In *Doyle v. Ohio*,[67] the United States Supreme Court held that the fourteenth amendment prohibited a prosecutor from using an accused's post-arrest silence as a tool for impeachment.[68] The Court stated that it was implicit in the *Miranda*

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[62] Chapman v. California, 386 U.S. 18, 21 (1967).

[63] Failure to object to a ruling or action by a trial court "at the time the ruling or order is made or sought" effectively waives any error which the court commits. KY. R. CRIM. P. 9.22 [hereinafter cited as RCr]. This rule applies to "[v]iolations of constitutional rights the same as [violations] of other rights." Jackson v. Commonwealth, 450 S.W.2d 244, 246 (Ky. 1970).

[64] "Any errors, defect, irregularity or variance which does not affect substantial rights shall be disregarded." RCr 9.24. This rule has often been the subject of judicial criticism: "We must be careful lest the purgatory of the harmless error doctrine erode our sacred constitutional rights." United States v. Hammond, 598 F.2d 1008, 1014 (5th Cir. 1979).

[65] Several recent cases deal with improper prosecutorial references to defendants' exercise of their constitutional rights. *E.g.*, Eberhardt v. Bordenkircher, 605 F.2d 275, 278 (6th Cir. 1979) ("remind[ed] the jury [in closing] . . . that the defendant had not taken the stand"); Scott v. Commonwealth, No. 79-SC-549-MR (Ky. May 13, 1980) (unpublished per curiam opinion) (defendant's refusal to consent to search mentioned during examinations); Carter v. Commonwealth, No. 79-SC-452-MR (Ky. May 13, 1980) (unpublished per curiam opinion) (prosecutor elicited from police officer that defendant "refused to waive his Miranda rights, refused to make a statement, and requested a lawyer"); Hockenbury v. Commonwealth, 565 S.W.2d 448 (Ky. 1978) (prosecutor referred in closing to defendant's post-arrest silence).

[66] *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[67] 426 U.S. 610 (1976).

[68] *Id.* at 619. Shortly before *Doyle*, the Kentucky Supreme Court stated: "The efforts of the prosecutor to impeach each appellant by reference to his silence at the time of identification and at the time of arrest plainly violated the Fifth Amendment right to remain silent." Niemeyer v. Commonwealth, 533 S.W.2d 218, 221 (Ky. 1976). However, the Court in *Niemeyer* affirmed the appellants' convictions on the ground that "the errors and irregularities were not prejudicial." *Id.* at 222.

decision "that silence will carry no penalty."[69]

In *Carter v. Commonwealth*,[70] the prosecutor, in his direct examination of the investigating officer, brought out the fact "that the appellant refused to waive his Miranda rights, refused to make a statement, and requested a lawyer."[71] The Kentucky Supreme Court summarily disposed of this issue on appeal, stating: "The appellant made no objection; consequently, the issue was not preserved for appellate review."[72]

While a strict application of the contemporaneous objection rule is called for upon review of certain types of errors at trial,[73] Kentucky decisions recognize that at least some degree of inquiry into the merits of the effect of errors which frustrate constitutional rights is necessary to prevent "manifest injustice."[74] Where, as in *Carter*, the constitutional infringement is the result of deliberate attempts of a prosecutor[75] to usurp those rights, a greater degree of protection than that afforded by the "manifest injustice" standard[76] is needed. Where a defendant sustains actual prejudice by such a violation, the contemporaneous objection rule serves only to facilitate prosecutorial misconduct and thwart the defendant's right to a fair trial.[77]

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[69] 426 U.S. 610 (1976).

[70] No. 79-SC-452-MR (Ky. May 13, 1980) (unpublished per curiam opinion), *rev'd on other grounds sub nom.*, Carter v. Kentucky, 49 U.S.L.W. 4225 (March 9, 1981). The United States Supreme Court reversed because the trial court refused to give an instruction requested by the defendant which would have admonished the jury not to consider his failure to testify on his own behalf.

[71] *Id.* slip op., at 3.

[72] *Id.*

[73] *See* Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977).

[74] Without a contemporaneous objection, appellate courts in Kentucky will not reverse a conviction "unless the prejudice was so apparent and so great as to result in a manifest injustice." Ferguson v. Commonwealth, 512 S.W.2d 501, 504 (Ky. 1974).

[75] Such conduct by a prosecutor has been widely condemned. *E.g.*. Niemeyer v. Commonwealth, 533 S.W.3d 218 (Ky. 1976):

> No one except for the judge himself is under a stricter obligation [than is the prosecutor] to see that every defendant receives a fair trial . . . . We consider this to be an inexcusable example of abuse by a public prosecutor. Officially, publicly, and as a word of caution to other similar officers, we disapprove of and condemn it.

Id. at 222.

[76] *See* 433 U.S. at 88-90.

[77] For an analogous example of a court's disregarding a rule which might bar

2. *Habeas Corpus Review*

Due to the existence of the contemporaneous objection requirement as a basis for upholding convictions despite constitutional violations, the federal courts are extremely limited in their ability to grant habeas corpus relief. This is so despite the fact that Kentucky appellate courts make some inquiry into the merits of an appellant's constitutional claim to determine if manifest injustice exists.

Where a state appellate court reviewed the *merits* of a claim of constitutional error and affirmed the conviction, a federal district court can grant habeas corpus review where that state determination is "plain error."[78] Where the state court refused to address the merits of a claim, due to the defendant's failure to comply with a state *procedural* rule for preserving that error,[79] federal habeas corpus review of the merits is precluded, absent a showing of "cause" for the noncompliance with the procedural rule and "prejudice" to the defendant.[80]

The third and most "difficult situation is created when the court has arguably done both,"[81] that is, made some review of the merits and refused to reverse on procedural grounds. Because Kentucky's manifest injustice exception requires some form of review, this third situation represents the majority of the cases. *Hockenbury v. Sowders*[82] is illustrative of this situation.

In *Hockenbury,* the Sixth Circuit Court of Appeals was faced with review of a habeas corpus action in which the fed-

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reversal in situations involving persistent prosecutorial misconduct, see text accompanying notes 111-13, *infra.*

[78] *See. e.g.,* Hockenbury v. Sowders, 620 F.2d 111, *rehearing denied,* 633 F.2d 443 (6th Cir. 1980).

[79] An example of such a failure is noncompliance with the contemporaneous objection rule.

[80] Wainwright v. Sykes, 433 U.S. 72, 81-82 (1977). The previous rule, rejected in *Wainwright,* "allow[ed] federal habeas corpus review, in spite of a defendant's failure to comply with the state's contemporaneous objection requirement, unless the defendant had attempted a 'deliberate bypass' of the state court procedure." 620 F.2d at 112.

[81] 620 F.2d at 115.

[82] *Id.* at 111.

eral district court found that certain questions and comments by the prosecutor were impermissible under *Doyle v. Ohio*.[83] Even though no objections were made to the statements and questions during the trial, the federal district court found they constituted "plain error"[84] and granted the writ for habeas corpus. On appeal, the Sixth Circuit found that "the District Court erred in making an independent assessment of 'plain error' rather than deferring to the state court's application of its contemporaneous objection requirement."[85] The Sixth Circuit held that "where the state court has arguably given more than one reason for the denial of petitioner's claim . . . the federal court must determine whether the petitioner's failure to comply with the contemporaneous objection requirement was a *substantial basis* of the state court's denial of petitioner's claim,"[86] and, if so, utilize the "cause" and "prejudice" test.

The unusual aspect of *Hockenbury* is that the review of the merits of the constitutional claim by the Kentucky Supreme Court was not merely a separate inquiry, detached from the procedural question. As the Sixth Circuit recognized, the constitutional review for "manifest injustice" was a threshold issue which "must be made *in order to determine whether to apply the procedural rule* or review [further] the merits."[87] Thus, the question whether a defendant's constitutional rights were violated to the extent that manifest injustice resulted must be answered in the negative *prior* to invocation of the procedural rule. It would appear that a federal district court ought to be empowered to review *that* constitutional determination for "plain error," and if it determines

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[83] 426 U.S. 610 (1976).

[84] *See* 620 F.2d at 113.

[85] *Id.* at 113-14.

[86] *Id.* at 115 (emphasis added).

[87] *Id.* at 116 (emphasis added). In Ferguson v. Commonwealth, 512 S.W.2d 501 (Ky. 1974), the Court noted that a review of the impact of a constitutional violation should precede the implementation of the contemporaneous objection rule: "No objections were made at the trial to the closing argument. That being the case, any impropriety in the argument would not be ground for reversing the judgment *unless the pejudice was so apparent and so great as to result in a manifest injustice.*" *Id.* at 504 (emphasis added).

that "manifest injustice" resulted, grant habeas corpus relief. This is so because "an adequate and independent procedural state ground"[88]—the contemporaneous objection rule—could not have been a "substantial basis" for denial of the defendant's claim *but for* the erroneous constitutional determination. In fact, under Kentucky's approach, the procedural rule is not "independent" of the constitutional review at all, but very dependent on it,[89] despite the frequent failure of our appellate courts to properly articulate the connection.

B. *Harmless Error Rule*

The United States Supreme Court, in *Griffin v. California*,[90] held that the fifth amendment prohibited any prosecutorial comment about the defendant's failure to take the stand. This prohibition is a constitutional protection also applicable to the states.[91] Such prosecutorial misconduct was present in *Eberhardt v. Commonwealth*,[92] wherein the prosecutor, during his closing argument, reminded the jury "indirectly but emphatically that the defendant had not taken the stand in his own defense."[93] An objection to this impermissible comment was sustained, "however, no cautionary instruction was given and a subsequent motion for a mistrial was denied."[94]

The Kentucky Supreme Court held it was not clear

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[88] *See* 620 F.2d at 113.

[89] *See* Hockenbury v. Sowders, 633 F.2d 443, 445-48 (6th Cir. 1980) (order denying rehearing) (Keith, J., dissenting).

[90] 380 U.S. 609 (1965). *See also* 18 U.S.C. § 3481 (1976).

[91] *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964). *See also* KRS § 421.225 (1972), which states: "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him." *Id.*

[92] No. 75.1120 (Ky. Nov. 12, 1976) (unpublished per curiam opinion).

[93] Eberhardt v. Bordenkircher, 605 F.2d 275, 278 (6th Cir. 1979). The remarks in question were: "What other witnesses could the defendant's case have put forward *who were totally available to you? What other witness? Ask yourself that question. Who else could have testified in this case?*" *Id.* (emphasis in original). The prosecutor then "gestured" or "pointed" toward the defendant. *Id.*

[94] *Id.* A recent Supreme Court case held that failure to give a "no inference" instruction on this issue, if requested, is error. Carter v. Kentucky, 49 U.S.L.W. 4225 (March 9, 1981).

"whether the prosecutor in his closing argument, had made remarks which were 'reasonably certain to direct the jury's attention to the defendant's failure to testify,' but even if he had, any error was 'nonprejudicial.' "[95] This finding was overturned three years later in *Eberhardt v. Bordenkircher*,[96] wherein the Sixth Circuit listed several factors which it considered in determining "whether the error was . . . harmless, given the evidence against the defendant and taken in the context of the trial as a whole."[97] Those factors included "the repeated nature of the prosecutor's comments";[98] whether the case "was such that 'honest, fair-minded jurors might very well have brought in not-guilty verdicts' ";[99] whether the case against the defendant was "overwhelming and undisputed";[100] whether "the error could reasonably be viewed as eradicated by the ruling of the trial judge, his admonition to counsel, and instructions to disregard";[101] and "whether the trial was otherwise relatively error-free."[102] The court noted that these guidelines, plus "the fact that harm is presumed to have flowed from constitutional error"[103] are of help in determining the issue of harmless error. In weighing these factors, the court observed that the prosecutor's comments were brief and not repeated, but, "while weighing in favor of a finding of harmless error,"[104] this factor alone was insufficient to prove harmless error beyond a reasonable doubt.

It could be argued that a violation of a constitutional right always prejudicially affects substantial rights. This position appeared supported by *Bennett v. Commonwealth*,[105] wherein the Court held: "Where the accused's constitutional rights are violated it is not necessary for him to show prejudi-

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[95] 605 F.2d at 278.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 279.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* The Court noted: "[I]t only takes a single comment . . . to remind a jury that the defendant has not testified." *Id.*

[105] 309 S.W.2d 183 (Ky. 1958).

cial error resulted. The mere violation of his constitutional rights is sufficient to work a reversal in a criminal case."[106]

It appears clear, however, that this proposition since has been rejected by the Kentucky[107] and United States Supreme Courts. In *Chapman v. California*,[108] the Supreme Court "declined to adopt any such [automatic prejudice] rule,"[109] but did state that "prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[110] However, where prosecutorial misconduct results in deliberate frustrations of constitutional rights, the better approach is that adopted ten years ago by the First Circuit Court of Appeals in *United States v. Flannery*.[111] That court, expressing a "sense of futility" from prosecutors' persistent disregard of its previous admonitions against such misconduct, stated: "[H]ereafter . . . we shall not endeavor to weigh prejudice, but shall rule it prejudicial as a matter of law."[112] The court noted only one possible exception to its automatic reversal rule:

> If the court interrupts the argument, instructs the jury fully

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[106] *Id.* at 186.

[107] The case under discussion, *Eberhardt*, clearly shows this. *See also* Darnell v. Commonwealth, 558 S.W.2d 590, 593-94 (Ky. 1977); Stiles v. Commonwealth, 570 S.W.2d 645, 647 (Ky. Ct. App. 1978).

[108] 386 U.S. 18 (1967).

[109] *Id.* at 21-22.

[110] *Id.* at 23. The Court gave three examples of "constitutional rights so basic to a fair trial that their infraction never [could] be treated as harmless error." *Id.* Those cited concerned coerced confessions, the right to counsel and the right to an impartial judge. *Id.* n.8.

One could also add the right of the defendant "to present his own witnesses to establish a defense," which is found in the sixth amendment right to compulsory process. Washington v. Texas, 388 U.S. 14, 19 (1967). In *Washington*, the Supreme Court found that the right was so fundamental to a fair trial that it was incorporated in the due process clause of the fourteenth amendment. In Webb v. Texas, 409 U.S. 95 (1972) (per curiam), the Supreme Court reversed a case where this right was denied, even though there was "overwhelming evidence of guilt, offset only by a bare allegation of prejudice." *Id.* at 99 (Blackmun, J., dissenting). This interpretation of *Webb*, "that there are some constitutional violations to which the harmless error rule does not apply," is supported in United States v. Hammond, 598 F.2d 1008, 1013 (5th Cir. 1979); United States v. Morrison, 535 F.2d 23 (3d Cir. 1976); and United States v. Thomas, 488 F.2d 334 (6th Cir. 1973).

[111] 451 F.2d 880 (1st Cir. 1971).

[112] *Id.* at 882.

on the defendant's constitutional right not to testify and the jury's obligation not to draw unfavorable inferences and, in addition states to the jury that the U.S. Attorney was guilty of misconduct, we may find no prejudice; otherwise we will reverse.[113]

IV. DOUBLE JEOPARDY

Burks v. United States[114] "held that the Double Jeopardy Clause of the Fifth Amendment protects a defendant from retrial following reversal of a conviction on the ground that the evidence produced at the trial was not sufficient to justify submitting the charge to the jury."[115] *Commonwealth v. Bur-*

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[113] *Id.* The Seventh Circuit, in United States v. Rodriguez, 627 F.2d 110 (7th Cir. 1980), while "declin[ing] to adopt as strict a rule" as in *Flannery*, stated it was "beginning to experience a similar sense of futility from the persistent disregard of prior admonitions as was experienced by the First Circuit." *Id.* at 112. The court further stated:

> [I]n . . . an unpublished order, we called attention to . . . *United States v. Buege*, . . . cautioning prosecutors about the use of improper arguments which draw even subtle attention to the failure of a defendant to testify. We cautioned against the use of terms such as "undisputed" and "uncontradicted" by the prosecutor in the case of a nontestifying defendant. It was pointed out that it is an area where the administration of justice will be served by avoiding arguably as well as blatantly improper comments. The final line of the order cautioned that continued failure to heed the admonition of this court would demonstrate that the admonition was ineffective, calling, therefore, for summary reversal.

Id. at 112.

See also Darnell v. Commonwealth, 558 S.W.2d 590 (Ky. 1977), where the prosecutor commented on defendant's pre-trial silence. In dissent, Justice Lukowsky said:

> I am compelled to conclude that prosecutors are deliberately disregarding [our] teaching[s] . . . in the hope of finding salvation in the harmless error doctrine. In other words, they are more interested in obtaining a conviction than in obtaining a conviction that will stick.
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> . . . .
>
> The time has come for us to take a more prophylactic approach. We should exercise our supervisory authority over the lower courts of Kentucky and hold that whenever this error is committed it will result in reversal and a new trial.

Id. at 596. In Campbell v. Commonwealth, 564 S.W.2d 528 (Ky. 1978), the Court stated: "While we have not yet reached the point where we think it necessary to invoke the prophylactic rule suggested by our brother Lukowsky . . ., we must admit our patience is wearing thin." *Id.* at 532.

[114] 437 U.S. 1 (1978).

[115] Crawley v. Kunzman, 585 S.W.2d 387, 388 (Ky. 1979). "[A]s Mr. Justice Douglas correctly perceived . . . it should make no difference that the *reviewing*

ris[116] brought "Kentucky law in[to] compliance with the decision of the United States Supreme Court in *Burks*."[117]

In *Burris*, the jury found the defendant guilty of robbery. Subsequently, the trial judge granted defendant's motion for judgment notwithstanding the verdict.[118] The Commonwealth appealed the judge's action. The Kentucky Court of Appeals "made a reassessment of the evidence produced at Burris' trial and decided the trial judge erred in granting judgment n.o.v.; the judgment was reversed with direction to let the verdict stand."[119] The Kentucky Supreme Court found that the trial judge acted within his authority and his determination of insufficient evidence "was functionally equivalent to a verdict or judgment of acquittal."[120]

The "functional equivalent of acquittal" doctrine also provided a state constitutional basis for the holding.[121] Relying on section 115 of the Kentucky Constitution, which provides that "the commonwealth may not appeal from a judgment of acquittal in a criminal case,"[122] the court held "that the Commonwealth was barred from securing appellate review of the judgment n.o.v."[123]

The next logical step would be to find that the double jeopardy clause barred retrial where there would have been insufficient evidence to uphold a guilty verdict but for the state's use of *inadmissible* evidence.[124] The Kentucky Court of Appeals, however, in *Phillips v. Commonwealth*,[125] decided

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court, rather than the trial court, determined the evidence to be insufficient . . . ." 437 U.S. at 11 (emphasis in original).

[116] 590 S.W.2d 878 (Ky. 1979).

[117] Phillips v. Commonwealth, 600 S.W.2d 485, 486 (Ky. Ct. App. 1980). Benton v. Maryland, 395 U.S. 784, 794 (1969), made the fifth amendment double jeopardy clause applicable to the states.

[118] This motion was under authority of CR 50.02, made applicable to criminal proceeding through RCr 13.04.

[119] 590 S.W.2d at 878.

[120] *Id.* at 879.

[121] *See* 437 U.S. at 17.

[122] KY. CONST. § 115.

[123] 590 S.W.2d at 879.

[124] This conclusion was reached in two other states. *See* Commonwealth v. Funches, 397 N.E.2d 1097, 1103 (Mass. 1979); State v. Abel, 600 P.2d 994, 999 (Utah 1979).

[125] 600 S.W.2d 485 (Ky. Ct. App. 1980).

otherwise. In *Phillips* a witness called by the Commonwealth refused to answer any questions concerning statements which incriminated the defendant that he had made to an investigating officer. The Commonwealth then called the police officer, who testified, over objection, about the statements made by the witness to him. The Kentucky Court of Appeals found that this use of testimony did not come within the *Jett* doctrine[126] and was "inadmissible because of the lack of opportunity for cross-examination."[127] However, the court would not accept the defendant's contention that a new trial was precluded under *Burris* because the evidence remaining would not have supported a conviction.[128] The *Phillips* opinion places Kentucky within the majority view.[129] Although *Phillips* did not give any reasons for the rule adopted, there are strong policy reasons to support the holding.[130]

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[126] *See* Jett v. Commonwealth, 436 S.W.2d 788, 792 (Ky. 1969).

[127] 600 S.W.2d at 486.

[128] *Id.*

[129] *See, e.g.*, United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); United States v. Block, 590 F.2d 535 (4th Cir. 1978); Morton v. State, 397 A.2d 1385 (Md. 1979); State v. Boone, 393 A.2d 1361 (Md. 1978); Ex parte Duran, 581 S.W.2d 683 (Tex. Crim. App. 1979); State v. Frazier, 252 S.E.2d 39 (W. Va. 1979).

[130] As stated by the Missouri Supreme Court in State v. Wood, 596 S.W.2d 394 (Mo. 1980):

> The prosecution in proving its case is entitled to rely upon the rulings of the court and proceed accordingly. If the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshall and offer every bit of relevant and competent evidence. The practical consequences of this would adversely affect the administration of justice, if for no other reason, by the time which would be required for preparation and trial of every case.

Id. at 398-99.